

**Sheet Metal Workers' International Association,
Local Union No. 104 and Dependable Sheet
Metal.** Case 20-CB-10032

August 8, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND
HIGGINS

Upon a charge filed August 2, 1995, by Dependable Sheet Metal, the Regional Director for Region 20 issued a complaint September 29, 1995, against the Respondent, Sheet Metal Workers' International Association, Local Union No. 104, alleging that the Respondent violated Section 8(b)(3) of the Act by failing and refusing to bargain on an individual basis with the Employer, Dependable Sheet Metal (Dependable). The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

On January 29, 1996, the General Counsel, the Respondent, and Dependable filed with the Board a stipulation of facts and a motion to transfer this case to the Board. The parties agreed that the charge, the complaint, the answer, the stipulation of facts, and the appendix, shall constitute the entire record. The parties also waived a hearing before, and the issuance of a decision by, an administrative law judge and indicated their desire to submit this case directly to the Board for findings of fact, conclusions of law, and a decision and order. On April 9, 1996, the Board issued an Order conditionally approving the stipulation.¹ Thereafter, the General Counsel, the Respondent, and Dependable filed briefs.

On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

Dependable, a corporation, with an office and place of business in Vacaville, California, has been engaged as a heating and sheet metal contractor in the construction industry. During the 12-month period ending December 31, 1994, Dependable, in conducting its business operations, purchased and received at its Vacaville, California facility goods valued in excess of \$50,000 from other enterprises located within the State of California, which goods the other enterprises had received directly from points outside the State of California.

¹ The Board's approval of the stipulation was conditioned on the parties' submission of certain missing appendix pages and on their further stipulation that at all material times the Employer has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act. The parties subsequently satisfied these conditions.

The parties stipulated and we find, that Dependable is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

Dependable has recognized the Respondent as the collective-bargaining representative of its employees since 1968. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective from July 1, 1992, to June 30, 1995.² At all times since April 16, 1991, the Respondent has been the exclusive collective-bargaining representative of the unit based on Section 9(a) of the Act.

At all material times, the Redwood Empire Chapter, Sheet Metal and Air Conditioning Contractors' Association, Inc. (Redwood SMACNA), has been an organization composed of various employers, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Respondent.

For approximately 5 years, Dependable authorized Redwood SMACNA to be its representative for the purpose of collective bargaining and for the adjustment of grievances. Pursuant to this authority, Dependable was bound to the terms of the July 1, 1986, to June 30, 1989 Standard Form of Union Agreement between the Respondent and Redwood SMACNA.

By letter dated January 24, 1989, Dependable notified Redwood SMACNA that Redwood SMACNA was no longer authorized to be its representative for the purpose of collective bargaining with the Respondent or for the adjustment of grievances. Also in 1989, Dependable resigned its membership in Redwood SMACNA, and since 1989, has not paid dues to Redwood SMACNA or to any other SMACNA Chapter.

Thereafter, Dependable bargained independently with the Respondent for a new collective-bargaining agreement to succeed the 1986-1989 Redwood SMACNA Standard Form of Union Agreement. Unable to reach accord on terms for a new agreement, the parties submitted the disputed issues to the National Joint Adjustment Board (NJAB), as required by the interest arbitration provisions of the 1986-1989 Standard Form of Union Agreement. On August 4, 1989, the NJAB issued a decision directing the parties to execute

² The following employees of Dependable constitute a unit appropriate for collective bargaining:

All employee classifications set forth in the collective bargaining agreement between the Employer and the Union in effect from July 1, 1992 to June 30, 1995, excluding guards and supervisors as defined in the Act.

a new 3-year collective-bargaining agreement identical in terms to the 1989–1992 Standard Form of Union Agreement and addenda, excluding the interest arbitration and most favored nations clauses.

A dispute arose between the Respondent and Dependable over the nonmandatory terms and conditions of employment imposed by the NJAB decision. Dependable filed a petition in the United States District Court for the Northern District of California to vacate the decision. The court remanded the matter to the NJAB. On August 8, 1990, in a clarification of its earlier decision, the NJAB ruled that because Dependable had not previously raised any specific nonmandatory issues other than interest arbitration, it had waived its right to negotiate over these matters. Dependable and the Respondent thereafter continued to litigate whether Dependable was bound to the nonmandatory terms of the 1989–1992 Standard Form of Union Agreement.

In letters dated January 21, 1992, Dependable notified both Redwood SMACNA and the Respondent that it intended to engage in individual bargaining for an agreement to succeed the 1989–1992 Standard Form of Union Agreement imposed by the NJAB award. By letters dated January 30, 1992, to Redwood SMACNA and the Respondent, Dependable reiterated its intent to bargain individually.

In early 1992, Dependable and the Respondent began negotiations for a new collective-bargaining agreement. During these negotiations, Dependable told the Respondent that it did not want to pay into the industry fund, because it was adamantly opposed to having any moneys go to Redwood SMACNA. The industry fund makes payments to Redwood SMACNA for industry promotion. Dependable told the Respondent that it wanted nothing to do with Redwood SMACNA.

On June 22, 1992, Dependable and the Respondent entered into an agreement settling their disputes,³ including the litigation concerning the 1989 NJAB award and the negotiations for a successor collective-bargaining agreement. The settlement provided that the parties would execute and abide by the 1992–1995 Redwood SMACNA Standard Form of Union Agreement, as modified to delete the industry fund and interest arbitration provisions. The settlement provided further that Dependable would be allowed to negotiate individually for a wage increase to take effect July 1, 1994, and if individual negotiations failed to yield an agreement on the amount of the increase, Dependable could choose to either pay an increase equal to that negotiated by Redwood SMACNA or to submit the matter to interest arbitration.

³The settlement resolved, by its terms, “all disputes, whether known or unknown” existing between the parties including, but not limited to, the negotiations for a successor collective-bargaining agreement, legal proceedings concerning the 1989 NJAB award, and a separate legal proceeding which is unrelated to the instant dispute.

At the time the parties entered into the settlement, Redwood SMACNA and the Respondent were still negotiating the 1992–1995 Standard Form of Union Agreement. The agreement ultimately negotiated by Redwood SMACNA and the Respondent contained an assignment of bargaining rights clause in article XIV, section 5, and in addendum 1, item 45, section B.⁴ Although Dependable never executed the 1992–1995 Standard Form of Union Agreement, it did abide by all of its mandatory terms and conditions of employment.

On December 2, 1992, Redwood SMACNA and the Bay Area Association of SMACNA Chapters (Bay Area SMACNA), entered into a participation agreement. As a result of that agreement, the bargaining rights of employer members of Redwood SMACNA were assigned to Bay Area SMACNA.

In mid-1994, Dependable informed the Respondent that it was prepared to pay the third year wage increase negotiated by Redwood SMACNA. Historically, the Respondent decided how such increases were to be allocated between wages and benefit trust funds. In response to Dependable’s inquiry, the Respondent told Dependable to accrue the money and the allocation would be determined later.

Sometime prior to June 30, 1994, the Respondent and Bay Area SMACNA began negotiations which culminated in January 1995 with an extension of the 1992–1995 Standard Form of Union Agreement term to June 30, 1999, in exchange for the elimination of the wage increase which was to take effect July 1, 1994. Dependable was not at the time affiliated with Bay Area SMACNA, and was not involved in the negotiations.

⁴Those provisions are set forth as follows:

Article XIV, section 5.

By execution of this Agreement the Employer authorizes Redwood Employer Contractors Association to act as its collective bargaining representative for all matters relating to this Agreement. The parties agree that the Employer will hereafter be a member of the multiemployer bargaining unit represented by said Association unless this authorization is withdrawn by written notice to the Association and the Union at least one hundred and fifty (150) days prior to the then current expiration date of this Agreement.

Addendum 1, item 45, section B.

The Sheet Metal Workers’ International Association Local Union 104 and Redwood Empire Sheet Metal & Air Conditioning Contractors’ Association, Inc., SMACNA Chapter, are hereby designated as the respective Labor and Management collective bargaining agents for all persons and firms bound by this Agreement, or those contracting or performing work covered by this Agreement within the jurisdiction of this Agreement and as such, said agents may, by mutual consent, at any time, open this Agreement and Addenda for renegotiations, amendments, renewal, deletion, modification, extension, or any other changes as may be agreed upon by them. Each Employer signatory to or performing work as described in Article 1, within the territorial jurisdiction of said Agreement, hereby agrees to be bound by such renegotiations, modifications, amendments, changes, extensions, or renewals on the same effective date as agreed upon between said Association and the Respondent.

Dependable received notices dated August 25, October 25, and November 30, 1994, from Bay Area SMACNA inviting all Bay Area SMACNA members and nonmember contractors to attend meetings concerning the negotiations. Two representatives of Dependable, Controller Philip Heil and Vice President Brad Hansen, attended one such meeting held on December 19, 1994. By voice vote, contractors in attendance approved the modifications and the extension of the 1992–1995 Standard Form of Union Agreement. Hansen and Heil did not participate in the vote.

Thereafter, Dependable received a letter from Bay Area SMACNA, dated January 13, 1995, addressed to all contractors signatory to a collective-bargaining agreement with the Respondent. The letter stated that all SMACNA members were to execute attached modifications to the 1992–1995 Standard Form of Union Agreement. The letter stated further that independent contractors who were not bound to the multiemployer negotiations were to indicate on the attachment their acceptance or rejection of the modifications and return a copy to SMACNA.

By letter dated January 15, 1995, Dependable returned to Redwood SMACNA the form from Bay Area SMACNA, on which it marked the option which read, “I hereby reject the option to amend my collective bargaining agreement as expressed above and agree to continue to be bound by the existing contract.”

By letter dated February 9, Bay Area SMACNA acknowledged Dependable’s January 15 correspondence and reminded Dependable that inasmuch as it had not accepted the option to amend its collective-bargaining agreement, it was obligated to abide by the terms of the existing agreement through June 30, 1995. Enclosed with the letter were wage/fringe schedules allocating the wage increase due under the existing agreement retroactive to July 1, 1994. According to the schedule, most of the increase was to be deposited into the Wage Equality Fund, from which the Respondent provides money to small signatory employers to allow them to bid competitively against nonunion contractors. Dependable contacted the Respondent and objected to the allocation because its employees would receive no benefit from the increase but would be taxed as if they had received the funds as income. The Respondent thereafter told Dependable to continue accruing the money.

Meanwhile, by letter dated January 26, 1995, with a copy to Redwood SMACNA, Dependable informed the Respondent that it intended to terminate their collective-bargaining agreement and to engage in individual bargaining towards a successor agreement.

By letter dated March 30, the Respondent asserted, for the first time, that Dependable was bound to the extension of the 1992–1995 Standard Form of Union Agreement negotiated with Bay Area SMACNA.

By letter dated April 17, Dependable informed the Respondent that it did not consider itself bound to the Bay Area SMACNA negotiations for an extension of the 1992–1995 Standard Form of Union Agreement.

By letter dated May 15, the Respondent informed Dependable that it considered Dependable bound to the extension of the 1992–1995 Standard Form of Union Agreement because it did not timely withdraw from the negotiations between Bay Area SMACNA and the Respondent prior to their commencement.

In accordance with its contention that Dependable is bound to the extension of the 1992–1995 contract until June 30, 1999, the Respondent has refused to bargain with Dependable on an individual basis for a new collective-bargaining agreement.

Dependable has not implemented the changes negotiated by the Respondent and Bay Area SMACNA, and has continued to abide by the 1992–1995 Standard Form of Union Agreement.

B. Contentions of the Parties

The General Counsel contends that the Respondent violated Section 8(b)(3) by refusing to bargain on an individual basis with Dependable. The General Counsel argues that Dependable’s failure to exclude the assignment of bargaining rights contained in article XIV, section 5, of the 1992–1995 Standard Form of Union Agreement from the 1992 settlement is insufficient to show that Dependable agreed to rejoin the multiemployer unit. The General Counsel contends that the Board must look at the entire context of the settlement agreement, including the development of the settlement through the parties’ negotiations and their conduct during the term of the agreement, to determine whether Dependable consented to multiemployer bargaining and to be bound by the actions of the multiemployer bargaining agent. The General Counsel asserts that Dependable’s conduct during these periods clearly manifests an intent to remain independent of SMACNA and to bargain individually.

The General Counsel also notes that the Respondent and Redwood SMACNA had not yet concluded their negotiations at the time the parties entered into the settlement. Therefore, Dependable could not have known that the 1992–1995 agreement would contain an assignment of rights clause. The General Counsel notes further that while article XIV, section 5, of the Standard Form of Union Agreement states that by execution of the agreement the employer authorizes the multiemployer group to act as its bargaining representative, Dependable never executed the agreement. Finally, the General Counsel contends that article XIV, section 5, is unenforceable because it is rendered ambiguous by other terms of the agreement which clearly contemplate that employers may execute the agreement and remain independent.

Dependable endorses the General Counsel's arguments. It also asserts that even assuming it assigned its bargaining rights to SMACNA, it terminated the assignment in a timely manner. Dependable contends that, although its notice of intent to bargain individually was served after negotiations had commenced to extend the Standard Form of Union Agreement, Dependable's notice was not untimely because the Respondent's negotiations with Bay Area SMACNA were unannounced and premature and Dependable did not receive notice of the negotiations until some three months after they began.

The Respondent contends that its refusal to bargain with Dependable on an individual basis was lawful because Dependable agreed to be bound by the 1992–1995 agreement containing the clause assigning bargaining rights to SMACNA. The Respondent contends that Dependable assented to the assignment of rights clause because the clause was not addressed in any discussion of items to be excluded from the collective-bargaining agreement. The Respondent further contends that after assenting to the assignment of its bargaining rights, Dependable failed to timely terminate the assignment. The Respondent argues that even assuming the negotiations were unannounced and premature, Dependable was still obligated to withdraw promptly after learning of the negotiations rather than waiting to see how they progressed before taking action. The Respondent argues that Dependable's failure to act promptly foreclosed it from withdrawing after negotiations had already concluded.

C. Discussion

The complaint alleges that the Respondent violated Section 8(b)(3) of the Act by refusing to bargain on an individual basis with Dependable. The Respondent maintains that its refusal to bargain on an individual basis was lawful because Dependable consented to multiemployer bargaining when it agreed to abide by the 1992–1995 Standard Form of Union Agreement which contains an assignment of bargaining rights clause. For the reasons set forth below, we find that Dependable did not consent to bargain on a multiemployer basis, and thus the Respondent's refusal to bargain individually with Dependable violated Section 8(b)(3).

Joining a multiemployer bargaining unit is consensual. In order to bind an employer to multiemployer bargaining, there must be evidence of that employer's unequivocal intent to be bound by the actions of the multiemployer bargaining representative. *Ernest Ongaro & Sons*, 323 NLRB 227, 228 (1997), citing *Plumbers Local 669 (Lexington Fire Protection Group)*, 318 NLRB 347, 348 fn. 14 (1995); *Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991); *Kroger Co.*, 148 NLRB 569, 573 (1964).

In *Ongaro*, the Board considered similar circumstances involving the same local union and a different employer. There, the Respondent contended it was privileged to refuse to bargain on an individual basis because the employer had delegated its bargaining authority to SMACNA when it failed to expressly object, during interest arbitration, to article XIV, section 5, of the 1992–1995 Standard Form of Union Agreement. The Board found that the totality of the employer's conduct during negotiations, and throughout the term of the 1992–1995 Standard Form of Union Agreement, manifested an intent to remain independent of SMACNA and to bargain individually. The Board concluded, therefore, that the refusal to bargain individually was violative of Section 8(b)(3).

In the instant case, we find that, like the employer in *Ongaro*, Dependable never manifested an intent to rejoin the multiemployer group. Rather, its conduct indicated an intent to remain independent of SMACNA. At the outset of negotiations for an agreement to succeed the 1989–1992 Standard Form of Union Agreement, Dependable advised the Respondent that it wanted nothing to do with Redwood SMACNA. It also opposed the industry fund provisions of the Standard Form of Union Agreement (which required contributions to the fund as a condition of membership in SMACNA) because it objected to the contributions going to SMACNA, and it successfully insisted on having those provisions deleted in the 1992 settlement. In addition, the settlement agreement expressly excluded the interest arbitration provisions of the Standard Form of Union Agreement, and included the right to bargain independently over a third year wage increase.

Moreover, during the term of the 1992–1995 Standard Form of Union Agreement, in correspondence with Bay Area SMACNA, Dependable indicated that it was an independent employer and that it rejected an option to modify its collective-bargaining agreement to incorporate changes negotiated by Bay Area SMACNA and the Respondent. Afterwards, it continued to abide by its collective-bargaining agreement, including the contractual third year wage increase.

Thus, the foregoing conduct demonstrates that Dependable clearly manifested an intent to remain independent of SMACNA and to bargain individually.

We find no merit to the Respondent's contention that, the foregoing conduct notwithstanding, Dependable consented to bargain on a multiemployer basis by agreeing to abide by the 1992–1995 Standard Form of Union Agreement which contained language assigning the bargaining rights of signatory employers to SMACNA. First, in view of the entire course of conduct by Dependable during the negotiations for the settlement agreement, the failure to specifically exclude the assignment of bargaining rights clause from the

1992–1995 Standard Form of Union Agreement does not show an unequivocal intent to bargain on a multi-employer basis. See *Ongaro*, supra at 228. Second, we note that while article XIV, section 5, states that by execution of the agreement the employer authorizes SMACNA to act as its bargaining representative, Dependable never executed the agreement. Thus, even under a literal application of the agreement, as urged by the Respondent, Dependable did not authorize SMACNA to act as its bargaining representative because Dependable never executed the actual agreement between the Respondent and SMACNA.⁵ Third, even assuming Dependable is to be considered a signatory employer, we note that other provisions in the agreement clearly contemplate that a signatory employer may execute the agreement without granting bargaining authority to SMACNA. For instance, addendum 1, item 34, section (b), of the Standard Form of Union Agreement specifies that employers who have executed the agreement but who have not delegated bargaining authority to SMACNA are nevertheless bound by all of the terms of the agreement.⁶ Thus, the applicability of the assignment of rights clause relied on by the Respondent is ambiguous when considered together with other provisions in the agreement.

In sum, we find that, under all the circumstances, Dependable did not rejoin the multiemployer bargaining group, or manifest a clear intent to bargain on a multiemployer basis in 1992 or thereafter.⁷ Accordingly, we find that the Respondent was obligated to bargain on an independent basis with Dependable for a new collective-bargaining agreement. By refusing to do so, it violated Section 8(b)(3) of the Act.

CONCLUSION OF LAW

By failing and refusing, since March 30, 1995, to bargain with Dependable concerning terms and conditions of employment of its bargaining unit employees, the Respondent violated Section 8(b)(3) of the Act.

REMEDY

Having found that the Respondent violated Section 8(b)(3) of the Act, we shall order it to cease and desist, to bargain on request with Dependable, and if an

understanding is reached to embody the understanding in a signed agreement.

ORDER

The National Labor Relations Board orders that the Respondent, Sheet Metal Workers' International Association, Local Union No. 104, San Francisco, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Dependable Sheet Metal concerning the terms and conditions of employment of its employees in the following appropriate unit:

All employee classifications set forth in the collective-bargaining agreement between the Employer and the Union in effect from July 1, 1992, to June 30, 1995, excluding guards and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Dependable Sheet Metal as the employer of the employees in the above-stated appropriate unit concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its union office in San Francisco, California, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Within 14 days after service of the attached notice by the Region, sign and return to the Regional Director sufficient copies of the notice for posting by Dependable Sheet Metal if willing, at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁵We note that there is no contention that Dependable's failure to execute the actual agreement was unlawful.

⁶Addendum 1, item 34, sec. (b), of the 1992–1995 Standard Form of Union Agreement provides:

An Employer who has executed this Agreement or has otherwise agreed to be bound by this Agreement shall be bound by all of the terms of this Agreement and the Standard Form of Union Agreement, even though such Employer has not authorized SMACNA, Redwood Empire Chapter as his/her collective bargaining agent.

⁷Having determined that Dependable did not consent to bargain on a multiemployer basis, we need not address the issue of whether it timely withdrew consent in 1995.

⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO MEMBERS
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain in good faith with Dependable Sheet Metal concerning the terms and conditions of employment of its employees in the following appropriate unit:

All employee classifications set forth in the collective-bargaining agreement between the Em-

ployer and the Union in effect from July 1, 1992, to June 30, 1995, excluding guards and supervisors as defined in the Act.

WE WILL, on request, bargain with Dependable Sheet Metal as the employer of its bargaining unit employees concerning their terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

SHEET METAL WORKERS' INTER-
NATIONAL ASSOCIATION, LOCAL UNION
No. 104